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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 681

VITO GENOVESE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Vito Genovese prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, reaffirming after remand by this Court the orders of the United States District Court for the Southern District of New York denying petitioner's motion for a new trial.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is printed as Appendix A to this petition (App. 1a-21a). The prior opinion of the court of appeals is reported *sub nom United States* v. *Aviles*, 315 F.2d 186 (2d Cir. 1963), *vacated and remanded sub nom Evola* v. *United States*, 375 U.S. 32 (1963). The opinions of the district court are reported *sub nom United States* v. *Aviles*, 197 F. Supp. 536 (S.D.N.Y. 1961) (per Judge Bicks), and 200 F. Supp. 711 (S.D. N.Y. 1961) (per Judge Murphy).

JURISDICTION

The prior judgment of the court of appeals was vacated by this Court on October 21, 1963. *Genovese* v. *United States*, No. 196, Oct. T. 1963, decided with *Evola* v. *United States*, 375 U.S. 32 (1963). The judgment of the court of appeals upon remand was entered on October 16, 1964 (App. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the action of the court of appeals upon the remand herein was consistent with this Court's mandate.

2. (a) What is the proper definition of the term "substantially verbatim" as used in the Jencks Act, 18 U.S.C. § 3500(e)(2).

(b) Whether notes properly found by a district court as a matter of fact to "set forth in substance what the witness said" may be held by an appellate court as a matter of law not to be "substantially verbatim".

3. Whether in a post-trial proceeding the government is estopped, by its violation of the trial court's order governing production of documents under the Jencks Act, from claiming the benefit of a more favorable standard of producibility than was applicable at the time of trial.

4. Whether pre-trial destruction of a government agent's interview notes, arguably within 18 U.S.C. § 3500(e), warrants invocation of sanctions under § 3500(d) or otherwise:

(a) where the agent testifies that he destroyed his notes in accordance with regular practice;

(b) where the agent testifies that he destroyed his notes deliberately in order to circumvent the Jencks rule.

5. Whether, as to a petitioner convicted on the uncorroborated testimony of a sole accomplice witness, deprivation of producible Jencks Act statements inconsistent with the witness' trial testimony can be deemed harmless error under the standard of *Rosenberg* v. *United States*, 360 U.S. 367 (1959).

6. To what extent, if any, is the government bound by a position taken by its counsel in this Court, or in a lower court, at a prior stage of the same litigation. In particular,

(a) May a concession by the Solicitor General in this Court be repudiated by the government in a lower court.

(b) May the government urge in this Court a ground for affirmance not urged in the court of appeals, or conceded by the government in the court of appeals.

(c) Do continual changes in the government's position, at the successive stages of the litigation on petitioner's motion for new trial, warrant grant of a new trial as a matter of due process, or in the exercise of this Court's supervisory powers over the conduct of federal criminal appeals.

STATUTE INVOLVED

The Jencks Act, 18 U.S.C. § 3500, is printed as Appendix B to this petition (App. 22a-23a).

STATEMENT

This case was previously before the Court in *Genovese* v. *United States*, No. 196, Oct. T. 1963, decided with eight companion cases *sub nom Evola* v. *United States*, 375 U.S. 32 (1963). At that time the Court unanimously granted certiorari, and the majority in a *per curiam* opinion held:

> "The judgment of the Court of Appeals for the Second Circuit is vacated and the cases are remanded to that court for reconsideration in light of *Campbell* v. *United States*, 373 U.S. 487, and for such further consideration as may be appropriate." 375 U.S. at 32-33.

Three members of the Court, in an opinion by Justice Clark, concurred with the grant of certiorari but dissented from the majority's decision to remand. The minority would have set the cases for argument on the merits in the 1963 term. *Id.* at 33.[1]

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[1] As Justice Clark's opinion forecast, the identical record on which the prior petition for certiorari was granted in No. 196, Oct. T. 1963, is again before the Court on this petition. Since the argument in this petition focuses primarily upon the developments and decision since remand, in order to minimize repetition

Upon remand, a majority of the panel adhered to its original decision, Judge Marshall dissenting. The majority opinion summarizes the procedural history of the case, through the remand, as follows.

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of materials previously presented to the Court frequent reference will be made to this petitioner's prior petition in No. 196, Oct. T. 1963, and to petitioner's reply to the brief in opposition to certiorari therein. In particular the Court is respectfully referred to the statement of the case at pp. 3-15 of the prior petition, which includes a more extensive account of the pre-remand proceedings on the new trial motion, and a summary of the evidence against petitioner at trial.

References to the petition and briefs in this C[illegible] in No. 196, Oct. T. 1963, will be made in the following manner:

The petition for certiorari will be cited "Pet. No. 196".

The brief in opposition to certiorari will be cited "Br. Opp. No. 196".

The reply to brief in opposition to certiorari will be cited "Pet. Reply Br. No. 196".

The briefs filed by the government in the court of appeals upon the original appeal from denial of the new trial motion and upon the remand, respectively, will be cited as "Gov. CA Br." and "Gov. Remand Br." Similarly, petitioner's briefs below will be cited as "Pet. CA Br." and "Pet. Remand Br."

The transcripts of he respective oral arguments before the court of appeals will be cited as "Oral Arg. Tr., Dec. 18, 1962" and "Oral Arg. Tr., April 16, 1964".

Record references will be to the printed appendices on the appeal from denial of the motion for new trial, cited as follows:

Petitioner's four-volume appendix of proceedings and [illegible] hibits on the motion for new trial will be cited by page [illegible] and suffix "a", *e.g.*, 1829a.

The government's one-volume appendix will be cited with prefix "G. App." and suffix "a", *e.g.*, G. App. 14a.

The further appendix bound with petitioner's petition for rehearing will be cited with prefix "R." and suffix "a", *e.g.*, R. 13a.

Any other brief or record references will be stated in full.

"For the sake of convenience, we repeat in part the facts of this case as set forth in our former opinion:

'After a three months' jury trial in the Southern District of New York, appellants were convicted, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U.S.C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F.2d 179, and the Supreme Court denied certiorari, *Evola* v. *United States*, 362 U.S. 974, 982, *rehearing denied, Genovese* v. *United States*, 363 U.S. 858.

'On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed. R. Crim. P., and put forth, as grounds for their motions: * * * (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U.S.C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. § 3500.

'After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F. Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F. Supp. 711.

'From these orders below adverse to them appellants now prosecute this consolidated appeal claiming that the grounds set forth above are individually and collectively sufficient to entitle them to a new trial under Rule 33, Fed. R. Crim. P. As to the grounds 1 through 6 set forth above, we affirm the order below on the careful opinion of Judge Bicks. As to the Shaw interview notes, we affirm the order of denial below for the reasons set forth hereafter.

* * * * * * * *

'In ruling on appellants' motions Judge Murphy separated the Shaw materials into three groups:

'(1) Materials which were not "substantially verbatim recitals" of Cantellops' statements. Into this group were placed Shaw's "chronology of facts," together with certain of Shaw's "original notes and assorted miscellany." Ruling that these materials would not have been found producible under 18 U.S.C. § 3500 had they been made available for the court's inspection during the original trial, Judge Murphy concluded that their nonproduction was not prejudicial to appellants' interests. See *Rosenberg* v. *United States*, 360 U.S. 367, 370 (1959). We cannot say that Judge Murphy's findings with respect to these materials were erroneous.

'(2) Materials which were "probably Jencks' statements." Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed "the great majority" of Shaw's original interview notes, was nonprejudical to appellants on the ground that "virtually the[ir] entire contents" "correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense."

'(3) Notes which "most assuredly should have been produced pursuant to § 3500." This group

consisted of handwritten notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not "unduly restricted" thereby: . . .' 315 F.2d 186, 188-89.

"Judge Murphy ordered that the third group of notes be turned over to the defendants for purposes of the appeal, and later, in response to an order of this court, he ordered that the second group be turned over as well. On the appeal, however, we ruled that defendants had not been entitled to either group of notes at the original trial. We based our decision on the ground that the notes were not producible 'statements' within the Jencks Act definition of that term, 18 U.S.C. § 3500(e). [Footnote quoting portions of § 3500 omitted. See App. 22a-23a, *infra*.] We therefore found it unnecessary to decide whether defendants had been prejudiced by the government's failure to produce the notes at the original trial. A request by the defendants for a rehearing, alleging various errors in our decision, was denied in an order dated April 10, 1963.

"In opposing defendants' petitions for certiorari, however, the government stated to the Supreme Court, 'Under the ruling of this Court in *Campbell* v. *United States*, No. 631, O. T. 1962, decided May 27, 1963, we accept Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. § 3500.' The government chose to rely entirely on the argument that defendants were not prejudiced by its failure to produce the notes. Thereafter, the Supreme Court remanded the cases to us requesting 'reconsideration in light of *Campbell* v. *United States*, 373 U.S. 487' and 'such further consideration as

may be appropriate,' 375 U.S. 32, 33." (App. 2a-6a.)

Upon remand, "the unusually helpful material furnished" to the court of appeals by the government (App. 2a) included a brief, filed by the United States Attorney, repudiating the Solicitor General's concession before this Court. (Gov. Remand Br., pp. 6-8.)[2] The Solicitor General had conceded that the "clearly erroneous" standard of review prescribed in *Campbell* v. *United States*, 373 U.S. 487 (1963),[3] applied to Judge Murphy's findings on producibility, and that under this standard the findings should be sustained. (Br. Opp. No. 196, p. 36.) The United States Attorney's brief maintained that the "clearly erroneous" standard of review was inapplicable for two reasons:

"A. Since Judge Murphy's findings as to producibility were based solely upon an examination

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[2] In its brief below, the government, after quoting its concession here that Judge Murphy's findings on producibility should be sustained (Br. Opp. No. 196, p. 36), explained:

"The basis for the Government's acceptance of Judge Murphy's findings as to producibility was its view at that time that under *Campbell II* this Court was bound by the 'clearly erroneous' doctrine to follow Judge Murphy's findings.

"After further study of the 'clearly erroneous' doctrine and the authorities discussed below, and after consultation with the Department of Justice, including the Solicitor General, we have concluded that the Government was mistaken in stating that *Campbell II* requires acceptance of Judge Murphy's findings as to producibility and that the 'clearly erroneous' doctrine does not apply in the circumstances of this case. The Department of Justice concurs in this conclusion." (Gov. Remand Br., p. 7.)

[3] Hereinafter cited as *Campbell II*. The prior decision in *Campbell* v. *United States*, 365 U.S. 85 (1961), will be cited as *Campbell I*.

> of documents and a transcript of testimony taken before another judge, the 'clearly erroneous' doctrine does not apply.
>
> * * * * * * * * *
>
> "B. The 'clearly erroneous' standard is inapplicable for the additional reason that Judge Murphy premised his findings of producibility upon an erroneous legal standard." (Gov. Remand Br., Point I, pp. 8-24; quotations are from headings in brief.)

However, the bulk of the government's brief was devoted to its asserted alternative ground for affirmance, that "Appellants were not prejudiced by non-production of the Shaw notes" (Gov. Remand Br., Point II, pp. 25-180).

The government's argument "A" for avoiding the "clearly erroneous" standard was not accepted by the court (see App. 8a-9a, 17a-18a and n. 2)[4], but its argu-

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[4] In so holding, the court below was in accord with this Court's application of the "clearly erroneous" standard of review in the very situation posited by the government's argument "A". *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950). There the district judge's findings in a civil antitrust suit were made solely upon the record of testimony and exhibits adduced in a criminal antitrust trial before a different judge. On appeal in the civil case, this Court held that the district judge's findings of fact may not be set aside unless "clearly erroneous". *Id.* at 495-96.

The "clearly erroneous" standard, promulgated by this Court in Rule 52(a), F.R.Civ.P., was intended to apply "whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony." Advisory Committee Note to Rule 52(a), 28 U.S.C.A. following Rule 52. See also *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960), holding that the "clearly erroneous" standard "applies also to factual inferences from undisputed basic facts." The holding appears applicable to Judge Murphy's inferences from Shaw's testimony and interview notes.

ment "B" was accepted by the majority (App. 9a-11a). The court did not pass upon the alternative ground of alleged lack of prejudice—which ground petitioner contended on remand, as he had here, was waived by the government's failure to assert it, and concession of it, on the prior appeal (Pet. Remand Br., pp. 13-19; Pet. Reply Br. No. 196, pp. 5-13). The majority construed this Court's mandate as calling for consideration of the prejudice question only if it resolved the question of producibility in appellants' favor. (App. 7a.)

The majority opinion held that Judge Murphy had employed an erroneous legal standard because he interpreted "substantially verbatim" in the same manner that Judge Bicks did at petitioner's trial. Both district judges held that statements of the witness Cantellops were "substantially verbatim" if they found them to contain "in substance what the witness said". But the majority below ruled that more stringent requirements were imposed, after petitioner's trial, by *Palermo* v. *United States*, 360 U.S. 343 (1959). For this reason, the majority held, it was entitled under the remand mandate to disregard Judge Murphy's findings and make its own. Accordingly, it adhered to its prior *de novo* findings and its conclusion that none of the interview notes held producible by Judge Murphy contained a "substantially verbatim recital" of any statement of Cantellops. (App. 9a-13a.)[5] Again,

[5] The majority opinion also considered the effect of *Campbell II* on the issue of destruction of agent Consoli's interview notes. The opinion accepted that portions of Consoli's notes might have been producible statements under the interpretation of 18 U.S.C. § 3500(e)(1) in *Campbell II*. However, the court made a *de novo* factual finding that copies of any destroyed (e)(1) notes were contained in typewritten reports produced at trial under § 3500 (e)(2). (App. 14a-16a.)

however, it made no *de novo* findings as to the materials which Judge Murphy had ruled were not producible. (See Pet. No. 196, pp. 20-21.)

The dissenting opinion of Judge Marshall contended that the majority had misinterpreted this Court's mandate. In his view, "Although this Supreme Court mandate is not free of ambiguity," the rendition of *de novo* findings disregarded not only "The most natural interpretation" of the mandate but all "other reasonable interpretations" as well. (App. 17a-19a.) Judge Marshall opposed the majority's disposition of the case, "not simply because it is wholly foreign to what was envisioned in the Supreme Court's remand mandate, but for more basic reasons." The latter reasons were, first, that the legal standard applied to Shaw's notes by Judge Murphy was correct, and second, that if Judge Murphy had used a wrong standard, the proper appellate course was to remand to him rather than to find the facts *de novo* on appeal. (App. 19a-21a.)

REASONS FOR GRANTING THE WRIT

1. The Court below disagreed upon the meaning of this Court's mandate remanding the case for reconsideration. The same panel which prior to remand had been unanimous in affirming denial of the new trial motion, divided two to one as to whether the remand order invalidated the basis of its prior holding. The majority ruled that it was free under terms of the mandate to reiterate its previous *de novo* findings as to producibility of Shaw's interview notes. Judge Marshall, dissenting, deemed such *de novo* fact-finding "wholly foreign to what was envisioned in the Supreme Court's remand mandate" (App. 19a). Only this

Court can resolve the conflict as to the interpretation of its own mandate.

Judge Marshall's view, that the majority's reason for rejecting Judge Murphy's findings was beyond the issues contemplated by the mandate, is supported by the terms of the Solicitor General's confession of error.

> "Under the ruling of this Court in *Campbell* v. *United States,* No. 631, O. T., 1962, decided May 27, 1963, we accept Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. 3500. There is thus no occasion to consider whether the court of appeals applied an improper standard in reviewing these findings, or whether the court of appeals improperly defined and applied the term 'substantially verbatim' in section 3500(e)(2), contentions advanced for consideration by petitioners. This Court, in *Campbell,* held that the factual findings and legal conclusions of the district judge in such matters are to be sustained on appellate review unless 'clearly erroneous'." (Br. Opp. No. 196, p. 36.)

Neither in the Solicitor General's brief in opposition, nor in its pre-remand brief or argument below,[6] had

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[6] The discussion of the "substantially verbatim" issue in the government's pre-remand brief in the court of appeals did not consider the standard of review (Gov. CA Br., pp. 20-25). At oral argument government counsel replied to petitioner's contention that the "clearly erroneous" standard applied, but relied only on the reason that Judge Murphy was not the trial judge and had not taken testimony.

> "The second preliminary matter I would like to address myself to is the question of the scope of review of Judge Murphy's determinations adverse to the government on the preliminary issues relating to the Shaw notes. This was not even adverted to by Mr. Williams. However, in his reply brief he asserts that the government must show that Judge

the government suggested that the "clearly erroneous" standard of review might be rendered inapplicable because of Judge Murphy's interpretation of "substantially verbatim". The failure of the government's brief on certiorari to indicate that such an issue was involved would have made a decision of the issue unnecessary in this Court, had it reviewed Judge Murphy's findings. See *Sicurella* v. *United States,* 348 U.S. 385, 391 (1955). The remand mandate was not an invitation to the government to search out new issues that it had not raised before remand and that would not have been open to it on plenary review in this Court.

The most apparent purpose of remanding "for reconsideration in light of *Campbell* v. *United States*" was to obtain the benefit of the appellate court's re-

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Murphy's decisions were clearly erroneous. I think that is not so.

• • • •

"The determination of a trial judge that notes or documents are or are not a substantially verbatim recital of the witness's testimony is granted great weight, and to overcome this it must be shown to be clearly erroneous. He is the one who has taken testimony on the question whether it is substantially verbatim. He is the one who exercises his discretion in the trial context. He has a feel for the trial situation, he knows and feels and understands what materials would be helpful to defend, what materials in fairness and justice they should have and not have and great weight must be placed and left to his discretion.

"In this case, this is a situation that arose after the trial. Judge Murphy was not the trial judge. Judge Bicks tried the case: Judge Murphy did not take any testimony, so even with the opinion on the question of whether or not the notes are substantially verbatim I would respectfully submit this court does not have to give any weight to Judge Murphy's determination and can review this question independently." (Oral Arg. Tr., Dec. 18, 1962, pp. 78-80.)

view of Judge Murphy's findings under the "clearly erroneous" standard. In *Campbell II,* where only a 500-word report of a single interview was involved, this Court itself conducted the review, and divided on whether the district court's findings were "clearly erroneous". Here, where the record contains 85 pages of interview notes, written on some eight different dates (1829a-1913a), this Court may well have wished court of appeals' confirmation that the Solicitor General's confession of error was warranted as to each portion of the notes.[7]

The remand mandate had, in petitioner's view, a second and perhaps principal purpose. The Court may have anticipated little likelihood that Judge Murphy's findings would be held "clearly erroneous", since the Solicitor General's concession of the point was "entitled to great weight".[8] But there remained the question of harmless error, which the government had sought to raise here as its sole ground for affirmance. Petitioner had contended that this question was foreclosed by the government's failure to urge it in the court of appeals, and by its concession when the bench *sua sponte* raised the issue with government counsel at

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[7] "While the Government accepts the District Court's finding that the Shaw notes should have been produced under 18 U.S.C. § 3500, this does not relieve the courts of the obligation to examine independently the error confessed." 375 U.S. at 33, n. (opinion of Justice Clark).

[8] *Young* v. *United States,* 315 U.S. 257, 258-59 (1942), quoted and followed in *Gibson* v. *United States,* 329 U.S. 338, 344, n. 9 (1946). Both *Young* and *Gibson* were cited in Justice Clark's opinion herein, 375 U.S. at 33, n.

oral argument. (Pet. Reply Br. No. 196, pp. 5-13.) This Court did not pass upon either party's contention, but its mandate included a provision "for such further consideration as may be appropriate." Petitioner construes this language as a directive for the court of appeals: (1) to consider the threshhold question of whether the government had waived the harmless error point, and (2) if it resolved the waiver question in the government's favor, to rule upon whether the error was harmless in any of the nine companion cases remanded. But the majority below construed the mandate to require no ruling on prejudice, in view of the ruling on producibility (App. 7a).

The majority's interpretation of the mandate also poses a serious question of due process. The majority found nothing in the mandate to preclude its basing its *de novo* findings of fact upon an affidavit by Shaw, (App. 13a). However, the affidavit was not even written until after Judge Murphy's ruling of December 22, 1961 (1796a), which was the subject of petitioner's appeal. Petitioner filed notice of appeal on December 28, 1961 (1799a), and Shaw's affidavit was dated January 10, 1962 (1816a). The Rules of the District Court precluded the affidavit from even being filed without leave of court. Rule 9(m), General Rules of the United States District Court for the Southern District of New York. The government on January 10 moved Judge Murphy for reargument and for leave to file the Shaw affidavit (1804a), but the motion was denied in its entirety (1827a).

The government has never contended that Judge Murphy abused his discretion in denying leave to file the Shaw affidavit or in denying the motion for reargu-

ment. Nor could the government have so shown, since the filing of the notice of appeal had terminated the district court's jurisdiction to grant reargument of its denial of the new trial motion. Had the court of appeals construed its mandate from this Court as one to review the district judge's factual determinations, it would hardly have relied upon an affidavit not filed in the district court and not even in existence at the time of the decision appealed from. But by construing this Court's mandate to allow *de novo* factual determinations by the court of appeals, the majority below apparently considered itself free to go beyond the record on which Judge Murphy could have acted in making his factual findings. For a court of appeals to decide crucial issues of fact upon the basis of *ex parte* factual assertions post-dating the ruling appealed from is, in petitioner's submission, so at war with traditional concepts of appellate review as to amount to a violation of due process. At the least, the practice is so novel as to bring the case within the rule that certiorari is appropriate, "Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 19(b), Supreme Court Rules.

2. The court below divided sharply upon the merits of the majority's interpretation of the statutory phrase, "substantially verbatim". The meaning of this term, in 18 U.S.C. § 3500(e)(2), is a recurrent problem in federal criminal cases. It is a potentially present question in every prosecution where a government witness has been interviewed prior to trial and the interviewer has made notes.

Certiorari was granted on the question of the meaning of "substantially verbatim" in *Campbell II*. (See question No. 2 in the *Campbell II* petition for certiorari.) The Solicitor General said of the issues before the Court in *Campbell II*:

> "[T]he issues are of great importance to the government in the enforcement of federal criminal statutes." *Campbell II*, Motion for Transfer of the Case from the Summary Calendar.

However, *Campbell II* was decided on other grounds, leaving the "substantially verbatim" question still open. 373 U.S. at 491 and n. 5.

The meaning of "substantially verbatim" has been the subject of a conflict among the circuits. As was noted in the *Campbell II* petition, and in the previous petition herein,[9] the restrictive interpretation of "substantially verbatim" by the First Circuit in *Campbell* v. *United States*, 296 F.2d 527, 532 (1st Cir. 1961), 303 F.2d 747, 748 (1st Cir. 1962), *reversed on other grounds*, 373 U.S. 487 (1963), conflicted with the Second Circuit interpretations in *United States* v. *Thomas*, 282 F.2d 191, 194 (2d Cir. 1960) and *United States* v. *McKeever*, 271 F.2d 669, 674-75 (2d Cir. 1959), with the Fifth Circuit interpretation in *Papworth* v. *United States*, 256 F.2d 125, 129 (5th Cir.), *cert. denied*, 358 U.S. 854 (1958), and with the interpretation of a district court of the Third Circuit in *United States* v. *Waldman*, 159 F. Supp. 747, 749 (D.N.J. 1958). The conflict between the First and Second Circuit views was pointed out by the Court of Appeals for the Ninth Circuit in *Ogden* v. *United States*, 303 F.2d 724, 735,

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[9] A more extensive discussion of the "substantially verbatim" issue is contained in Pet. No. 196, pp. 22-32.

n. 35 (9th Cir. 1962), although the court did not there find it necessary to reach a choice between the "restrictive reading" of the First Circuit and "the more liberal construction" of the Second Circuit cases. This Court "intimate[d] no view on the correctness of" the First Circuit's position, *Campbell II*, 373 U.S. at 491, n. 5.

The opinion below appears to move close to the restrictive First Circuit view, by holding that notes which only "set forth in substance what the witness said" are, as a matter of law, not "substantially verbatim" (see App. 10a-11a).[10] This position is clearly in conflict with that of the Fifth Circuit in *Papworth* v. *United States, supra,* at 129, that longhand notes recording "the highlights of the conversation" qualify as "substantially verbatim". In *Papworth,* the agent testified that his interview notes "contained the substance of the information given to him by the witness." *United States* v. *Papworth,* 156 F. Supp. 842, 853 (N.D. Tex. 1957), *affirmed, Papworth* v. *United States,* 256 F.2d 125, 129 (5th Cir.), *cert. denied,* 358 U.S. 854 (1958). The conflict is even clearer between the majority opinion below and the decision rendered only two weeks earlier by the District of Columbia Circuit in *Isaac Williams* v. *United States,* No. 18,462, 33 *U.S.* LAW WEEK 2163 (D.C. Cir. Oct. 1, 1964). In *Williams,* the trial and appellate courts both accepted the testimony of the interviewer that "he gets down the essen-

[10] The court of appeals did not dispute Judge Murphy's factual finding that the notes did "set forth in substance what the witness said", nor hold that this factual finding was "clearly erroneous." Rather, the court below held that such a factual finding could not as a matter of law support the conclusion that the notes were "substantially verbatim".

tial part, the heart of the testimony, tries to put down the substance of the witnesses' testimony". The district court concluded that, as a matter of law, such a statement was not "substantially verbatim". The court of appeals held that, as a matter of law, such a statement was "substantially verbatim", under the standard of *Palermo* v. *United States,* 360 U.S. 343, 350 (1959). Thus in *Williams* and in the instant case the district court found the interviewer's recording to contain the "substance" of the witness' remarks. The Second Circuit reversed because it deemed it error to conclude that such a recording was "substantially verbatim", while the District of Columbia Circuit reversed because it was error to fail so to conclude.[11]

The court of appeals herein, like the District of Columbia Circuit in *Williams,* held that the test for producibility under § 3500(e)(2) was that laid down in the *Palermo* opinion, 360 U.S. at 350, and cited with approval in *Campbell II* at 495: whether the statement as recorded is such that its use for impeachment would be "grossly unfair". (See App. 12a; 33 U.S. LAW WEEK at 2163.) The report of the witness' interview held producible under this test in *Campbell II* contained "the substance of his account." 373 U.S. at 490. But the construction of the *Palermo* test below

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[11] The procedures employed upon review by the respective circuits were also in conflict. The District of Columbia Circuit, upon holding that the district court had applied "an erroneous legal standard", did not thereupon make findings *de novo.* On the contrary, it stated that "we accept the [district] court's basic findings of fact", and applied to those findings the legal standard which it deemed correct. *Isaac Williams* v. *United States, supra,* slip opinion at 6. The Second Circuit, by contrast, completely disregarded Judge Murphy's factual findings once it determined that his legal definition of "substantially verbatim" was incorrect. (App. 11a.)

is so narrow as virtually to read out of the statute the area of discretion which *Palermo* and *Campbell II* entrusted to district judges. See 360 U.S. at 353 and 360-61;[12] 373 U.S. at 493. Judge Marshall's dissent pointed out that the majority had ignored "the basic value judgment underlying *Campbell II*, namely, that district or trial judges and not circuit judges are the ones best suited to make the findings of fact required in applying the Jencks's Act" (App. 20a).

The majority held, in effect, that Judge Murphy, a highly experienced trial judge and former prosecutor, had authorized "grossly unfair" impeachment of a government witness. Yet it cited no instances in which the witness Cantellops had been quoted out of context by Shaw, so that impeachment from the notes would be unfair (see *Palermo, supra*, at 352). Judge Murphy's conclusion on producibility was aided by his opportunity to compare the notes with Cantellop's extensive verbatim grand jury testimony, under examination by Shaw, covering the same areas as the Shaw notes. See 200 F. Supp. at 714, 715. His conclusion is further buttressed by the argument of the government on remand: numerous illustrations cited by petitioner of how the Shaw notes could have been used to impeach Cantellops at trial (Pet. CA Br., pp. 37-59, 65-95) were countered by the government's claim that Cantellops had been similarly impeached at trial by use of verbatim grand jury testimony or statements

[12] Although the majority opinion below suggested that Judge Murphy had not been guided by the standards laid down in *Palermo* (App. 9a), Judge Murphy cited *Palermo*, at 354, 360-61, as his authority that Shaw's notes should have been turned over to the trial court to determine "whether or not they were 'in substance what the witness said.'" See 200 F. Supp. at 714 and n. 4.

(Gov. Remand Br., pp. 65-140; see also Br. Opp. No. 196, pp. 37-46). It was never suggested that impeachment with the verbatim documents was unfair. How then could similar impeachment with the notes be "grossly" so?

In applying the "grossly unfair" test of producibility, the court of appeals overlooked the significance of the government's argument on prejudice. The government made the remarkable showing that there were some 351 instances in which "the available cross-examination material exposed Cantellops' substantial prior perjury as well as his occasional faulty recollection and confusion as to certain details . . . ." (Gov. Remand Br., pp. 36 and 37-54).[13] This pattern of mendacity on the part of the sole, uncorroborated witness against petitioner was a factor, ignored by the appellate court, which a district judge would properly allow for in considering whether impeachment of Cantellops would be "grossly unfair." In applying the guidelines of *Palermo* to the "myriad" "possible permutations of fact and circumstance" which it envisioned (360 U.S. at 353), a district judge may well distinguish between what would be unfair impeachment of a professional accountant, who testified in *Palermo,* and of a professional "pusher" and perjurer, who testified here.

The court of appeals based its holding that use of the Shaw notes would have been "grossly unfair" on three types of variance.

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[13] The government set forth 117 such instances in its brief, and stated that these were based upon examination of only one-third of the material made available at trial. The government suggested, "there is every reason to assume that a similar comparison with the remaining two-thirds would disclose a comparable proportion of inconsistencies." (Gov. Remand Br., p. 37.)

> "The variances between the Shaw notes and the oral statements of the government witness went beyond matters of grammar, syntax, and chronology. [1] There were certain omissions in the notes attributable to the fact that Cantellops spoke rapidly and in poor English. [2] There were other omissions when Cantellops' story was thought by Shaw to be incoherent, illogical, or in conflict with what he then believed to be the facts. [3] There were also additions of related matter from other sources." (App. 13a; numbers in square brackets added.)

The third of the foregoing factors plainly offers no support to the decision. Not only do the notes furnished[14] fail to show, and the opinion to point out, the use of any other sources, or inclusion of any information not obtainable from Cantellops. But more important, the addition of extra material could not remove the "substantially verbatim" character of what had already been recorded. The remedy for such additions is excision. Otherwise the government could always avoid production by the simple expedient of adding non-producible interpolations to its "substantially verbatim" notes.

The first two of the factors relied upon by the court of appeals conflict with the rationale of this Court's decision in *Palermo*. The first was one of which Judge Murphy expressly took account (see 200 F. Supp. at 716). His findings as to the intelligibility of the witness' broken English and manner of speech—and in particular that the linguistic difficulties Shaw had de-

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[14] The record does not show that the interview notes produced before Judge Murphy were all that Shaw took. Shaw did not so testify, nor did the government so represent. (See 1760a-62a, 1770a.)

scribed did not prevent Shaw from comprehending and accurately recording the "substance" of Cantellops' remarks—is the very type of decision which should rest finally "within the good sense and experience of the district judge", *Palermo, supra,* at 353. It should not be reversed upon the contrary finding of appellate judges that a witness' speech was so difficult to record as to cause unspecified "certain omissions" in the notes.

The second factor cited by the court of appeals is predicated solely upon the Shaw affidavit. Such use of the affidavit on appeal is highly questionable (see *supra,* pp. 16-17). But assuming the affidavit may be used to show Shaw's omission of Cantellops' "incoherent, illogical" or untrue remarks, this kind of omission can not satisfy *Palermo's* test of unfairness to the witness (360 U.S. at 350). Far from rendering it "grossly unfair" to impeach Cantellops through the notes, Shaw's practice of deliberate omission gave the witness greater protection than he was entitled to. The government, having taken the position that Cantellops was deliberately lying to Shaw at the time (Gov. Remand Br., 126-127),[15] can hardly claim that the inclusion of further lies would have made the notes consistent with the trial testimony.

The late Judge Clark, who did not sit on the panel below, had occasion to note the need for Supreme Court review of the original panel decision, since adhered to on the remand:

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[15] *E.g.*, the government argued that, in a verbatim statement of October 10, 1957, Cantellops "spun a spurious yarn to Shaw". (Gov. Remand Br., p. 127.) Shaw's interview notes of October 10 and 11, 1957 (1829a-1852a) would presumably reflect the same mendacious approach on Cantellops' part.

> "We seem generally unwilling to upset convictions when the Jencks Act, 18 U.S.C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in . . . *United States* v. *Aviles,* 2 Cir., March 8, 1963, that the defense is not entitled to statements not sufficiently exact, though to the district judge 'probably verbatim,' recitals of the witness's oral statements. By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. See *Scales* v. *United States,* 367 U.S. 203, 258; *Palermo* v. *United States,* 360 U.S. 343, 346; *Jencks* v. *United States,* 353 U.S. 657, 668-69. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from the Supreme Court." *United States* v. *Cardillo,* 316 F.2d 606, 615-16 (2d Cir.) (concurring opinion), *cert. denied,* 375 U.S. 822 (1963).

The appropriateness of the original appellate decision for this Court's review was again noted in Justice Clark's opinion opposing remand:

> "I deem plenary consideration here preferable to this remand because the delineation of the limits of the Jencks Act has been peculiarly the province of this Court." 375 U.S. at 33, n.

The same considerations apply to review of the decision rendered on remand, which reiterated the prior decision's strict construction of Jencks Act rights.

3. The pre-remand holding of the court of appeals was directed to the issue of whether the defendants would have received Shaw's notes *at trial,* had the government not withheld them from Judge Bicks.

> "We hold, consequently, that the Shaw materials contained no statements which, *had they been delivered to the trial court for in camera inspection, would have been found* to be producible under the Jencks Act." 315 F.2d at 192 (emphasis supplied; footnote omitted).

Although not so directed by the mandate, the court addressed its holding upon remand to a different issue: whether defendants should have received the notes under post-trial interpretations of the Jencks Act. The court held that the interpretation of "substantially verbatim" applied by Judge Bicks at trial, and accepted by Judge Murphy, was in conflict with this Court's decision, rendered several months after petitioner's trial, in *Palermo* v. *United States,* 360 U.S. 343 (1959). (See App. 10a-11a.) The court of appeals apparently assumed, without discussion, that on a new trial motion it should not apply the law existing at the time that the government withheld the notes from the trial judge.

The court's ruling on remand thus holds, in effect, that the government should profit from its own wrongdoing in withholding Shaw's notes at trial. The court of appeals no longer disputes Judge Murphy's finding that, had the notes been delivered to Judge Bicks at trial, Judge Bicks would have found them producible under the same standard that he applied to other Jencks materials (200 F. Supp. at 714-16). Even if Judge Bicks' standard were incorrect, petitioner contends, it was the law of the case, and so properly ap-

plicable on the new trial motion. It also comported with the then current interpretation of § 3500 by the Second Circuit, as stated in its opinion in *United States* v. *Palermo,* 258 F.2d 397, 399 (2d Cir. 1958), *affirmed,* 360 U.S. 343 (1959). That opinion, antedating petitioner's trial, held that,

> "the evident purpose of the statute is to limit the right of inspection for use in cross-examination to *reasonably accurate* or authenticated statements . . . ." 258 F.2d at 399 (emphasis supplied).

It also indicated that an interviewer's memorandum could qualify under § 3500 if "the memorandum was a transcript of notes taken during the interview." *Ibid.* At the time of trial, Judge Bicks would properly have held that "notes taken during the interview" by Shaw, which contained "in substance what the witness said", qualified as "reasonably accurate" statements producible under § 3500(e)(2).

4. This record presents another question argued but not determined in *Campbell II,* as well as *Campbell I*: the legal consequences of an agent's pre-trial destruction of his interview notes.[16] In *Campbell I* this Court had left open the "important question" of whether all such destruction, or only bad faith destruction, calls for the sanctions authorized by 18 U.S.C. § 3500(d):

> "The parties argue whether destruction may be regarded as the equivalent of non-compliance with an order to produce under that subsection. The Government contends that only destruction for improper motives or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances should be so

[16] This question is discussed in further detail in Pet. No. 196, pp. 39-43.

> regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d). We do not yet know that such a paper existed, and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of [the agent's] testimony." 365 U.S. at 98.

The question was again left open in *Campbell II*. See 373 U.S. at 489, n. 2 and 491, n. 5.

The instant record does afford the "opportunity to decide this important question of the construction of subsection (d)" which was not reached in *Campbell I* or *II*. The Court here has the benefit of three different agents' testimony as to the circumstances of their destruction of interview notes; and this testimony presents both the good faith and bad faith situations. Narcotics agent Rowan has testified that he destroyed his notes in order "[t]o circumvent the Jencks decision" (916a, see also 1137a, 1146a). Agents Consoli and Muglia, on the other hand, have each testified that they destroyed their notes only because these were no longer needed for investigative purposes (see 826a, 902a; 1361a-63a, 1375a-77a).

The court of appeals held that this issue could be avoided with regard to agent Consoli, by making a *de novo* factual finding that the defense received copies of all his destroyed notes. The court found that Consoli had copied all of his interview notes into typewritten memorandum reports which he prepared for each interview, and which were produced at trial. (App. 15a-16a.) The court apparently overlooked that the Consoli memoranda produced at trial included only three made during the period in which—according to Consoli's post-trial testimony—he had interviewed Cantellops 45 times. (See 897a-98a; R. 1a-8a.) Al-

though on cross-examination by government counsel Consoli claimed that at many of these "interviews" he had said no more than hello to Cantellops (see 899a), it appears most unlikely that there were only three interviews at which Consoli took any notes. Consoli testified that, "I did interview him on numerous occasions" (824a) "very often, very often" (860a), and that it was his practice to take notes during the interviews and check them with Cantellops for accuracy (825a-26a, 860, 871a-73a). The finding that the typewritten memoranda reproduced the notes was also in conflict with Consoli's testimony that the memoranda contained "a summary of the substance" of the notes (902a). On this record it cannot fairly be concluded that the defense received in the three memoranda copies of Consoli's numerous, destroyed interview notes. The legal question of the consequences of destruction under § 3500(d) should therefore be reached.

Even if the appellate finding could avoid the § 3500 (d) question with regard to Consoli's notes, the same question would remain regarding the notes of Muglia and Rowan. The record can not establish that copies of the notes which they had destroyed were received by the defense at trial. Muglia testified on the new trial motion, under direct examination as a government witness, that he had made handwritten notes at two interviews with Cantellops, and made a typewritten memorandum of each (1357a-58a). At trial, however, Muglia testified that only one of the typewritten reports which he had filed was based upon his notes of an interview with Cantellops, and accordingly only that one was ordered produced (G. App. 13a-14a). Destruction of Muglia's interview notes prevents a determination whether the trial testimony regarding the source of the second typewritten report was false.

But it is apparent that one of Muglia's two sets of handwritten interview notes was not received by the defense, either directly or as copied into a typewritten report.

In the case of agent Rowan, Shaw's testimony on cross-examination established that Shaw's own file contained interview notes taken by Rowan. These handwritten notes of Rowan comprised approximately one tenth as many pages as Shaw's. (1637a.) The Rowan notes contained as much writing as 17 to 34 pages of Shaw's notes (Shaw was not certain whether Rowan wrote on both sides of the page). (See Pet. No. 196, pp. 41-42.) The four brief excerpts from Rowan's typewritten reports produced at trial (R. 13a-16a), cannot conceivably have contained copies of all these handwritten notes.

5. Judge Murphy's *in camera* ruling[17] that withholding of Shaw's notes was harmless has never been the subject of appellate review. Petitioner has suggested that the government waived any harmless error contention by its failure to assert this as a ground for affirmance on the appeal from Judge Murphy's order (see p. 11, *supra*). If the waiver contention is not accepted, petitioner asks that this Court dispose of the prejudice question in order to avoid further protraction of the litigation. (Petitioner's new trial motion was filed in August, 1960, and he has been serving his fifteen year sentence of imprisonment since February, 1960.) The government should not be afforded another remand to argue the harmless error question to the court of appeals. That court noted that the gov-

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[17] Shaw's notes were submitted to Judge Murphy for *in camera* inspection (1780a-83a). Only after Judge Murphy ruled that deprivation of the notes was harmless were the notes turned over to the defense. See 200 F. Supp. at 715-18; App. 5a.

ernment had already delayed a final disposition through its prior concession here.

> ". . . but upon remand the government has repudiated its last year's concession. We do wish to point out, however, in view of the fact that the Supreme Court heard no oral argument when it granted certiorari and forthwith remanded the cases to us, that if the government had not made its short-lived concession in the first place, the Supreme Court might have finally disposed of the appeals with a consequent saving of time and energy all around. See dissenting opinion of Justice Clark, 375 U.S. 32, 33." (App. 6a.)

Under *Campbell II*, there can in any event be little substance to a contention that withholding of the Shaw notes was harmless as to this petitioner. *Campbell II* reaffirmed the harmless error test of *Rosenberg* v. *United States*, 360 U.S. 367 (1959). See 373 U.S. at 497, n. 14. The test of harmless error applied in *Rosenberg*, was whether the defendant had received at trial from some other source "the same information," "the very same information," that was contained in the erroneously withheld Jencks material. *Id.* at 370-71. In *Campbell II*, the Court noted that, in light of *Rosenberg*, "Understandably no contention has been made that the refusal to produce the interview report can be deemed harmless error. . . ." 373 U.S. at 497, n. 14. This marked a contrast with the government's position in *Campbell I*, where it had contended that the same error was harmless as to two of the three petitioners. Brief for the United States in *Campbell I*, No. 53 Oct. T. 1960, pp. 29-30.

The instant petitioner's position is far stronger than that of the two petitioners as to whom the government reversed its position in *Campbell II*, or that of the petitioner in *Rosenberg*. For here the petitioner was

convicted solely on the uncorroborated testimony of the accomplice-witness whose impeaching interview notes were withheld.[18] The government has not claimed, or Judge Murphy held, that petitioner received from other sources "the very same information" that appeared in the Shaw notes. (See Pet. Reply Br. No. 196, p. 28.) Judge Murphy's rationale was the very different one, that further impeaching material "would simply add umber to an already blackened witness." 200 F. Supp. at 717.

6. Both courts below pointed out that the government's conduct in regard to the Shaw notes at trial was not to be condoned. 315 F.2d at 192, n. 3; 200 F. Supp. at 714. An even more serious question, petitioner submits, is raised by the government's shifting approach toward the Shaw notes on appeal from denial of a new trial. In *Berger* v. *United States*, 295 U.S. 78, 88 (1935), this Court stated the established principle:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The successive changes in the government's position at each stage of the litigation concerning Shaw's notes suggest that the mandate of *Berger* has not been satisfied here.

Before Judge Murphy, the government (the only party which knew the content of Shaw's notes) did not

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[18] The trial testimony against petitioner is summarized in Pet. No. 196, pp. 7-10. As is there noted, both the trial court in its instructions and the Solicitor General have acknowledged that Cantellops' testimony as to this petitioner was uncorroborated.

assert lack of prejudice as a ground for denial of the new trial motion.[19] But having prevailed before Judge Murphy solely upon this ground, which it had not argued, the government declined to defend this ground on appeal. After failing to mention the point in its 99-page appellate brief, the government conceded when questioned by the court at oral argument that Judge Murphy was "wrong" in everything but his result, and that improper withholding of the notes was prejudicial *if* the notes were producible under § 3500. (The pertinent portions of the oral argument are quoted in Pet. Reply Br. No. 196, pp. 7-10.) The government relied upon the position that the notes were not producible.

Having prevailed in the court of appeals solely upon its argument that the Shaw notes were not producible under § 3500, in this Court the government conceded that they were producible. (Br. Opp. No. 196, p. 36.) Despite this confession of error, the government asked this Court to deny certiorari, relying solely on the very ground which it had refused to defend below: that Judge Murphy's ruling as to lack of prejudice was "clearly correct". (*Id.*, pp. 36-46.) The government thus sought to terminate the litigation through a denial of certiorari to review the concededly erroneous ruling on producibility, without appellants having secured any appellate determination of the merits of Judge Murphy's ruling on prejudice—which ruling in turn had been rendered before appellants were permitted to see the notes on which it was based (see App. 5a).

Following remand to the panel upon whom it had confessed error, the government repudiated its con-

[19] The five grounds relied upon by the government before Judge Murphy are quoted in Pet. Reply Br. No. 196, p. 6, n. 3.

fession. When government counsel stated at argument, "if our concession played any part in the Supreme Court's remand of this case, it is a regrettable situation", Judge Waterman observed:

> "It is the duty of the Department of Justice to see that justice is done rather than win cases. I would think it was the duty of the Solicitor General to make that presentation to the Supreme Court and ask it to reconsider its case." Oral Arg. Tr., April 16, 1964, pp. 54-55.[20]

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[20] In the preceding colloquy, counsel explained the government's position:

"MR. GENIESSE: [government counsel] • • •

As to the concession by the Solicitor General on this point, I can only say to the Court that this was obviously not a tactical maneuver.

JUDGE WATERMAN: It wasn't? Why did he make the concession?

MR. GENIESSE: I am talking about the position we now take, which is contrary.

JUDGE WATERMAN: Oh, your position?

MR. GENIESSE: Yes, your Honor. The concession originally was obviously based—and I say I had nothing to do with it—on the understanding of the Department of Justice at that time as to the meaning of the Campbell decision. The reason that the concession was withdrawn is what I say is not a mere tactical maneuver. There is no playing fast and loose with the Court in this case. This was a responsible and difficult decision made by the attorneys in the Department of Justice, myself included, and the Solicitor General included.

I would like to clear away the impression that this office has repudiated what the Solicitor General did. That is not the case. There is complete agreement on every level of the Department of Justice on the position we urge here today. We never said the Solicitor General was wrong. The Solicitor General agrees with us that he was. We are not attacking the Solicitor General." (Oral Arg. Tr., April 16, 1964, pp. 53-54.)

Upon the remand, the government sought an extension of time to permit it to brief the question of prejudice, which it had previously declined to argue in the court of appeals. It offered to the court the remarkable explanation that, "This office did not brief the point in view of the district judge's favorable ruling below and must make the necessary analysis of the above materials for the first time in connection with the reconsideration." (Affidavit of government counsel in support of motion to extend time to file appellee's brief in court of appeals, December 20, 1963.) If an appellee were excused from briefing a point because of "the district judge's favorable ruling below," there would seem to be little role left for the appellee in the reviewing process.

Finally, on remand, the government found fault with the rulings of the one judge in the case on whom it had not yet confessed error: the trial judge. In order to attack Judge Murphy's finding, that Judge Bicks would have ordered Shaw's notes produced at trial had the government not withheld them from Judge Bicks' inspection, the government claimed Judge Bicks had erred in holding statements "substantially verbatim" if they contained "in substance what the witness said". (Gov. Remand Br., pp. 17-19.) It was on this theory, first asserted on the remand, that the government prevailed.

In short, before the district court the government prevailed on the question of prejudice, although the Shaw notes were held producible. On appeal the government abandoned the favorable ruling on prejudice, but successfully contended that the notes were not producible. In the Supreme Court the government conceded that the notes were producible, but argued that

the district court ruling on prejudice should be upheld. Upon remand, the government repudiated both of its previous concessions, and urged affirmance on both grounds.

Under this Court's rules, it is a ground for certiorari that, "a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 19(b), Supreme Court Rules. Petitioner submits that the "exercise of this court's power of supervision" is similarly warranted where the departure from the usual norm of appellate proceedings has been that of the government rather than the appellate court. The government's continuing reversal of its position as it has proceeded from court to court, and back again, appears unprecedented in the annals of federal criminal litigation. We ask that the government be called upon to show how this conduct demonstrates its interest in this "criminal prosecution is not that it shall win a case, but that justice shall be done." The appropriate forum for such a showing, we respectfully submit, is at the bar of this Court upon plenary review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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November 13, 1964

APPENDIX

RETURN

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 370—September Term, 1963

(Argued April 16, 1964 Decided October 16, 1964)

Docket No. 27377

UNITED STATES OF AMERICA, *Appellee,*

v.

ALFREDO AVILES, CHARLES BARCELLONA, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZIE, CARMINE POLIZZANO, RALPH POLIZZANO, and SALVATORE SANTORA, *Defendants-Appellants.*

Before: WATERMAN, MOORE and MARSHALL, *Circuit Judges.*

Upon remand from the United States Supreme Court, 375 U. S. 32, our affirmance, 315 F. 2d 186, of the denial of motions for a new trial, United States District Court for the Southern District of New York, Bicks, *J.*, and Murphy, *J.* 197 F. Supp. 536, 200 F. Supp. 711, is adhered to.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (Robert J. Geniesse, Michael W. Mitchell, Paul R. Grand, John S. Martin, Jr., David M. Dorsen, Asst. U. S. Attorneys, of counsel), *for Appellee.*

MAURICE EDELBAUM, New York City, *for Appellant Evola.*

ALBERT J. KRIEGER, New York City, *for Appellants Charles Di Palermo and Joseph Di Palermo.*

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WILFRED L. DAVIS, New York City, *for Appellant Gigante.*

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WATERMAN, *Circuit Judge*:

When this appeal was first before us, we affirmed the orders of Judge Bicks and Judge Murphy denying defendants' motions for a new trial. Our opinion is reported at 315 F. 2d 186 (1963). Subsequently the Supreme Court granted certiorari, vacated our judgment, and remanded the case to us for reconsideration. *Evola* v. *United States,* 375 U. S. 32 (1963). In view of the importance of the case we authorized the parties to file additional briefs and to present further oral argument. Having studied with great care the unusually helpful material furnished to us by both sides, we adhere to our original decision.

For the sake of convenience, we repeat in part the facts of this case as set forth in our former opinion:

> "After a three months' jury trial in the Southern District of New York, appellants were convicted, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U. S. C. §§173, 174. Their convictions were affirmed on appeal to this court, 274 F. 2d 179, and the Supreme Court denied certiorari, *Evola* v. *United*

States, 362 U. S. 974, 982, *rehearing denied, Genovese* v. *United States*, 363 U. S. 858.

"On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed. R. Crim. P., and put forth, as grounds for their motions: (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops, at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U. S. C. §3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U. S. C. §3500.

"After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F. Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F. Supp. 711.

"From these orders below adverse to them appellants now prosecute this consolidated appeal claiming that the grounds set forth above are individually and collectively sufficient to entitle them to a new trial under Rule 33, Fed. R. Crim. P. As to the grounds 1 through 6 set forth above, we affirm the order below on the careful opinion of Judge Bicks. As to the Shaw interview notes, we affirm the order of denial below for the reasons set forth hereafter.

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"In ruling on appellants' motions, Judge Murphy separated the Shaw materials into three groups:

"(1) Materials which were not 'substantially verbatim recitals' of Cantellops' statements. Into this group were placed Shaw's 'chronology of facts,' together with certain of Shaw's 'original notes and assorted miscellany.' Ruling that these materials would not have been found producible under 18 U. S. C. §3500 had they been made available for the court's inspection during the original trial, Judge Murphy concluded that their nonproduction was not prejudicial to appellants' interests. See *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959). We cannot say that Judge Murphy's findings with respect to these materials were erroneous.

"(2) Materials which were 'probably Jencks' statements.' Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed 'the great majority' of Shaw's original interview notes, was nonprejudicial to appellants on the ground that 'virtually the[ir] entire contents' 'correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense.'

"(3) Notes which 'most assuredly should have been produced pursuant to § 3500.' This group consisted of handwritten notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Mur-

phy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not 'unduly restricted' thereby: . . ." 315 F. 2d 186, 188-89.

Judge Murphy ordered that the third group of notes be turned over to the defendants for purposes of the appeal, and later, in response to an order of this court, he ordered that the second group be turned over as well. On the appeal, however, we ruled that defendants had not been entitled to either group of notes at the original trial. We based our decision on the ground that the notes were not producible "statements" within the Jencks Act definition of that term, 18 U. S. C. §3500(e).[1] We therefore found it

[1] The statute provides in part as follows:

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

"(d) If the United States elects not to comply with an order of the court under paragraph (b) . . . to deliver to the defendant any such statement, . . . the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b) . . . and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

unnecessary to decide whether defendants had been prejudiced by the government's failure to produce the notes at the original trial. A request by the defendants for a rehearing, alleging various errors in our decision, was denied in an order dated April 10, 1963.

In opposing defendants' petitions for certiorari, however, the government stated to the Supreme Court, "Under the ruling of this Court in *Campbell* v. *United States,* No. 631, O. T. 1962, decided May 27, 1963, we accept Judge Murphy's findings that the Shaw notes should have been produced under 18 U. S. C. 3500." The government chose to rely entirely on the argument that defendants were not prejudiced by its failure to produce the notes. Thereafter, the Supreme Court remanded the cases to us requesting "reconsideration in light of *Campbell* v. *United States,* 373 U. S. 487" and "such further consideration as may be appropriate," 375 U. S. 32, 33.

Defendants argue that we should hold the government bound by the concession it made before the Supreme Court that the Shaw notes should have been produced under 18 U. S. C. §3500(e). To do so, however, would be to ignore the Supreme Court's remand order, which requests us to reconsider our decision in the light of *Campbell* v. *United States,* and not in the light of the government's concession. The defendants also contend that, in any event, we should accord great weight to this concession by the Department of Justice, but upon remand the government has repudiated its last year's concession. We do wish to point out, however, in view of the fact that the Supreme Court heard no oral argument when it granted certiorari and forthwith remanded the cases to us, that if the government had not made its short-lived concession in the first place, the Supreme Court might have finally disposed of the appeals with a consequent saving of time and energy all around. See dissenting opinion of Justice Clark, 375 U. S. 32, 33.

Campbell v. *United States,* 373 U. S. 487 (1963) (hereinafter *Campbell II*) involved the question of whether either

notes taken by a government agent at an interview with a government witness, or the interview report compiled by the government agent from his notes which were subsequently destroyed, were producible statements within the meaning of the Jencks Act, 18 U. S. C. §3500(e). The Supreme Court held that the findings of the district judge on this question were not to be disturbed unless clearly erroneous; and that the district judge was not clearly erroneous in finding the notes to be producible under 18 U. S. C. §3500(e)(1) and the report to be a producible copy of the notes. In view of this result, the Supreme Court found it unnecessary to decide whether the destruction of the notes called for sanctions under 18 U. S. C. §3500(d).

These are the rulings in the light of which we are asked to reconsider our former decision. As for the portion of the remand order requesting "such further consideration as may be appropriate," we construe it to mean that if in the light of *Campbell II* we hold that the Shaw notes and certain other materials were producible under the Jencks Act, we should go on to consider whether the government's failure to produce these materials at the original trial was harmful error, a question we found it unnecessary to discuss in our former opinion. There is nothing in the remand order to suggest that we should take the extraordinary step of deciding the entire appeal all over again.

I

Defendants claim that *Campbell II* requires us to affirm Judge Murphy's finding that most of the Shaw notes were producible under 18 U. S. C. §3500(e)(2), unless his finding was clearly erroneous. In our former opinion we adopted a much broader standard of review:

> "In ruling that the October 10 and 11 notes were Jencks 'statements,' and that the great majority of Shaw's other original interview notes were probably 'verbatim recitals' within the Act's definition, Judge

Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions. As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below." 315 F. 2d 186, 191.

Defendants are correct in arguing that *Campbell II* bears on the question of how freely we may review Judge Murphy's findings. Although that case concerned producibility under 18 U. S. C. §3500(e)(1), its holding that the findings of the district court were not to be disturbed unless clearly erroneous applies to §3500(e)(2) as well. The Supreme Court based the holding largely on *Palermo* v. *United States,* 360 U. S. 343 (1959), which was an (e)(2) case. Furthermore, as the government acknowledges, the issues under (e)(1) and (e)(2) are often similar. Thus, in *Palermo* the Supreme Court decided whether an interview memorandum "could fairly be deemed to reflect fully and without distortion what had been said to the government agent," 360 U. S. 343, 352, while in *Campbell II* the Court decided whether an interview report "may fairly be deemed a copy" of interview notes approved by the witness, 373 U. S. 487, 493.

As far as it went, however, our ruling concerning the scope of review was compatible with *Campbell II.* The result in that case turned largely on the credibility of live testimony given before the same district judge whose findings were being scrutinized by the appellate courts. Accordingly, the Supreme Court based its holding in part on the ground that the findings of the district judge "may well have depended upon nuances of testimony and demeanor of witnesses," *ibid.* As all the evidence before Judge Mur-

phy was in writing and as no witness was orally examined in his presence, this reasoning is not applicable to our case. See *Evola* v. *United States,* 375 U. S. 32, 33 (dissenting opinion).

The Supreme Court based its holding in *Campbell II* on two other grounds as well: The findings of the district judge as to producibility "required the *ad hoc* appraisal of one of the 'myriad' 'possible permutations of fact and circumstance,' *Palermo* v. *United States, supra,* 360 U. S., at 353, present in such cases," and they "concerned a subject, rulings on evidence, which is peculiarly the province of trial courts," 373 U. S. 487, 493. This decisional rationale goes beyond that of our former ruling and consequently requires us to consider the problem further.

To support its reasoning, the Supreme Court in *Campbell II* quoted *Palermo*:

> " 'Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts.' *Palermo* v. *United States,* 360 U. S. 343, 353." *Ibid.*

This passage suggests to us that if the district court mistakes the standards outlined by the Supreme Court for applying 18 U. S. C. §3500(e)(2), and is not guided thereby, its findings are no longer entitled to their usual respect. Such a view is in accord with the settled doctrine that "findings of fact that are induced by an erroneous view of the law are not binding." 5 Moore, Federal Practice, ¶52.03 [2], at 2631 (2d ed. 1951); *accord, United States* v. *Singer Mfg. Co.,* 374 U. S. 174, 193 (1963); *United States* v. *Parke, Davis & Co.,* 362 U. S. 29, 44 (1960); *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 394 (1948).

Moreover, in all the cases cited, the Supreme Court not only stated the correct legal standard but went on to make its own findings of fact. It did not remand the cases to the district court for any reconsideration below. Our court has followed this procedure where the error concerned the law of evidence, where the facts were in dispute, and where the findings of the district court were based wholly on written material. *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 569 (2 Cir. 1961); cf. *Mastercrafters Clock & Radio Co.* v. *Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F. 2d 464, 467 n. 7 (2 Cir. 1955), *cert. denied*, 350 U. S. 832 (1955).

In determining whether the Shaw notes were a "substantially verbatim recital" of what Cantellops told Shaw, Judge Murphy applied the same legal test that was employed by the trial court at the original trial of the defendants. 200 F. Supp. 711, 714-15. We, on the other hand, applied the test in *Palermo* which was laid down by the Supreme Court subsequent to the original trial, 315 F. 2d 186, 191-92. Defendants argue, as they did in their petitions for a rehearing of our former decision, that Judge Murphy was right and we were wrong, but we rejected this argument in denying the petitions for rehearing; and nothing said in *Campbell II* requires us to reconsider our choice.

There is a marked difference between the test employed by Judge Murphy and the test prescribed by *Palermo*. Judge Murphy asked whether the Shaw notes "set forth in substance what the witness said," 200 F. Supp. 711, 715. *Palermo* makes it clear that this is not enough to satisfy the requirements of 18 U. S. C. §3500(e)(2): "Summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced." 360 U. S. 343, 352-53. On the contrary, "only those statements which could properly be called the witness' own words should be

made available to the defense for purposes of impeachment," 360 U. S. 343, 352.

As Judge Murphy's findings of fact were induced by a mistaken view of the law, the limited review of a district judge's findings prescribed by *Campbell II* does not apply, and, in consequence, we were free to determine the facts for ourselves.

II

Defendants claim that *Campbell II* requires us, ourselves, to find that most of the Shaw notes were producible under 18 U. S. C. §3500(e)(2). In our former opinion we decided to the contrary:

> "Shaw testified at the post-trial hearing before Judge Bicks that he met with Cantellops 20 or 30 times over the course of almost a year. He testified that Cantellops spoke rapidly and in poor English, requiring that he 'almost translate it and put it into a more recognizable form of English.' He stated that the notes were never read back to Cantellops, that Cantellops never signed or initialed them, and that only about one half of the notes contained information elicited from Cantellops, the remainder containing information from 'close to a dozen different sources.' Finally, Shaw testified that it was his practice to go over the notes after the interview and make additions to them, as the notes were taken not for the purpose of providing a record of Cantellops' testimony, but to assist Shaw in drafting the chronological statement and to serve as a guide in interrogating Cantellops before the grand jury.
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> "Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument, substantiates the foregoing, and adds that Shaw was selective in his note-taking and did not record the testimony that he thought was 'incoherent, illogical or

in conflict with what the assistant then knew to be the fact from other witnesses.'

"Finally the documents themselves indicate that they are the result of a process of selection. They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops. Further, the signs of addition and interpolation are evident on the face of the documents.

"We hold, consequently, that the Shaw materials contained no statements which, had they been delivered to the trial court for *in camera* inspection, would have been found to be producible under the Jencks Act." 315 F. 2d 186, 192.

Defendants are correct in arguing that *Campbell II* bears on the question of whether, under 18 U. S. C. §3500(e)(2), the Shaw notes were a "substantially verbatim recital" of what Cantellops told Shaw. Although *Campbell II* was concerned with the question of whether an interview report was a "copy" of a written statement made and adopted by a government witness under (e)(1), the issues are similar. The Supreme Court made this clear by employing in *Campbell II* the test laid down in *Palermo,* an (e)(2) case: "Whether it would be 'grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own.' *Palermo* v. *United States, supra,* 360 U. S., at 350," 373 U. S. 487, 495.

In *Campbell II,* the Supreme Court held that the interview report was a copy of the written statement, there being no "material differences between the statement and the report . . . The only variances, apparently, are grammatical and syntactical changes, rearrangement into chronological order, and omissions and additions of information immaterial for impeachment purposes," 373 U. S. 487, 495 n. 10. Moreover, "the district judge was entitled to infer that an agent of the Federal Bureau of Investigation of some 15

years' experience would record a potential witness' statement with sufficient accuracy'' to qualify the interview report as a copy of the written statements, 373 U. S. 487, 495.

Our former decision is nowise inconsistent with these rulings. The variances between the Shaw notes and the oral statements of the government witness went beyond matters of grammar, syntax, and chronology. There were certain omissions in the notes attributable to the fact that Cantellops spoke rapidly and in poor English. There were other omissions when Cantellops' story was thought by Shaw to be incoherent, illogical, or in conflict with what he then believed to be the facts. There were also additions of related matter from other sources. These omissions and additions of information were not immaterial for impeachment purposes. It would have been grossly unfair to allow the defense on cross-examination to confront Cantellops with the Shaw notes as if they were his own statements. Although courts should show the greatest liberality in making available to the defense any writing which represents what the witness may have said, they must also be meticulous in satisfying themselves that what is made available truly represents the witness' own statements. On the specific facts here presented the latter requirement has not been met.

Moreover, the inference that government agents are accurate recorders of witnesses' statements is inapplicable in this case. It was not Shaw's aim to provide a record of Cantellops' story, but to draft for his own use a chronological statement which would serve, as well, as a guide in interrogating Cantellops before a grand jury. As for the defendants' argument, first asserted in their petitions for rehearing of our former decision, that the Shaw affidavit is not properly part of the factual record before us, we rejected that argument when we denied the petitions for rehearing; and nothing said in *Campbell II* requires us to reconsider that conclusion.

Inasmuch as the Shaw notes were not properly producible under 18 U. S. C. §3500(e)(2), a new trial on account of the government's failure to produce them was rightly refused.

III

Defendants claim that *Campbell II* requires us to find that the Consoli notes were producible under 18 U. S. C. §3500(e)(1), and that the decision invites us to rule that the destruction of the notes by the government calls for sanctions under 18 U. S. C. §3500(d). In our former opinion we approved verbatim Judge Bicks' disposition of this point:

> "Agent Consoli, a member of the Enforcement and Special Squads, took notes during interviews with the witness Cantellops. These interviews were to be the subject of memorandum reports which Consoli planned to and did write. His unimpeached testimony is to the effect that the contents of the notes were incorporated in a memorandum report and thereafter the notes were destroyed. These notes, however, were not verbatim but were handwritten accounts of selected portions of the interviews and hence, not 'statements' within the Jencks statute. There is no suggestion nor any basis for a suggestion that Consoli's handwritten notes which were used in the preparation of his reports were destroyed in bad faith or with the intention to circumvent the Jencks case or statute. In any case, the relevant portions of Consoli's memorandum reports were made available to movants at the trial in the exercise of the Court's discretion." 197 F. Supp. 536, 557-58.

It is apparent that Judge Bicks was concerned only with the producibility of the Consoli notes under 18 U. S. C. § 3500(e)(2) and not under (e)(1). This was entirely proper in view of the state of the law at that time. *Campbell II* has now given a broad reading to (e)(1), however, and we assume for the sake of argument that it encom-

passes certain portions of the Consoli notes. But *Campbell II* also held that destruction (at least in good faith) of interview notes producible under 18 U. S. C. §3500(e)(1) does not call for sanctions under 18 U. S. C. §3500(d) if the defense is furnished with a copy of the notes, 373 U. S. 487, 491 n. 5.

Our former disposition of this part of the appeal is confirmed by the holding of *Campbell II*. Judge Bicks ruled, on the basis of live testimony, that the Consoli notes were destroyed in good faith, and there is nothing in the record making this finding clearly erroneous. Judge Bicks did not rule, however, on the question of whether the memorandum reports were a copy of the interview notes, and, were he still an active judge, we might, because he heard live testimony on the point, return the case to him for a finding on this issue. Regrettably, Judge Bicks has since died, and, in order to expedite this appeal, we shall ouselves decide the question.

Consoli testified at the post-trial hearing before Judge Bicks that he made a memorandum report for each set of his interview notes; that he incorporated the interview notes into his memorandum reports without changes, additions, or ommissions; that he then expanded the memorandum reports with material of other kinds; that he read back to Cantellops for his approval those portions of the memorandum reports derived from the interview notes; and that his superiors reviewed the memorandum reports for accuracy and clarity but made no changes in them. Nothing in the memorandum reports or in the record throws doubt on this testimony. Accordingly, we find that those portions of Consoli's memorandum reports that purport to have been statements made by Cantellops are copies of Consoli's interview notes.

At the original trial, Judge Bicks turned over to the defense those portions of the memorandum reports that he found producible under 18 U.S.C. §3500(e)(2). This might

not have been enough if there had been other portions of the memorandum reports that contained matter producible under (e)(1). Therefore, we have examined all the memorandum reports written by Consoli which were delivered to Judge Bicks, and we find that everything in them which could possibly have been statements made by Cantellops was turned over to the defense. As the defendants received a copy of all the Consoli interview notes, their good faith destruction by the government did not call for sanctions under 18 U. S. C. §3500(d).

The orders of Judge Bicks and Judge Murphy denying defendants' motions for a new trial are again affirmed.

MARSHALL, *Circuit Judge* (dissenting):

The real controversy before us involves Shaw's notes entitled "Re: Conversation with Nelson Cantellops on October 10, 1957" and "10/11/57." It is upon the failure of the Government to produce these notes that defendants' motion for a new trial must rest.

Judge Murphy held that these "notes most assuredly should have been produced pursuant to §3500." 200 F. Supp. 711, 715-16. Yet he denied the motion for a new trial on the ground that the nonproduction was non-prejudicial. Judge Murphy concluded that even though these notes were "statements" and hence producible under the Jencks Act, and even though they contained new impeaching information not otherwise available to defendants, "in the context of this long trial and in view of the fact that the witness' credibility had been so exhaustively explored we hold that the failure to produce Shaw's [October 10-11, 1957] notes was not prejudicial to defendants." 200 F. Supp. at 717. An appeal was taken from Judge Murphy's order denying the motion for a new trial and in our opinion of March 8, 1963 we affirmed. We never reached the question of whether the nonproduction was prejudicial. In-

stead, we took the position that these notes were not statements and hence not producible within the meaning of the Jencks Act. 315 F. 2d 186, 191-92. We prefaced our inquiry into the question whether these notes were producible with the announcement that we were going to give very little weight, if any, to the findings of the District Judge: "As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below." *Id.* at 191.

On May 27, 1963, little more than two months after we handed down our opinion in the appeal from Judge Murphy's order the Supreme Court decided *Campbell* v. *United States* [*Campbell II*], 373 U. S. 487, which held that a district judge's findings of fact supporting a ruling that a writing is a "statement" within the meaning of the Jencks Act and hence producible should not be disturbed by a circuit court of appeals unless these findings are "clearly erroneous." On October 21, 1963, the petitions for writs of certiorari in these cases were granted by the Supreme Court, our judgment "vacated," and the cases remanded to this Court "for consideration in light of" *Campbell II* and "for such further consideration as may be appropriate." Although this Supreme Court mandate is not free of ambiguity, I feel that my Brothers have misinterpreted its import. I, therefore, must respectfully dissent.

The most natural interpretation of the Supreme Court's mandate is that we were in error in making the *de novo* inquiry into the question of whether the notes were producible and that the clearly-erroneous standard of *Campbell II* would apply even if the district judge's factual findings were made under §3500(e)(2) rather than §3500(e)(1)[1] and the evidence before the district judge was writ-

[1] My Brothers acknowledge this, see *supra* pp. 3188-3189.

ten and documentary rather than live testimony.[2] Our judgment was vacated because it was premised on a conception of the role of a reviewing court which *Campbell II* implied, if not actually held, was mistaken. Yet the Supreme Court's remand mandate left enough room for us to decide whether the findings of Judge Murphy were "clearly erroneous," and, if we decided that question in the negative, to decide whether Judge Murphy erred in holding that the unlawful nonproduction was non-prejudicial and not sufficient to warrant a new trial.[3]

There are, of course, other reasonable interpretations of the remand mandate; for example, since our decision predated *Campbell II* by two months, the Supreme Court may have wanted to give us an opportunity to decide whether the "clearly erroneous" standard applied when the evidence before the trial judge was entirely written and documentary and then to take other appropriate action. Or it is even conceivable that the Court wanted us to follow the procedure used by the First Circuit after the remand in *Campbell I*, 365 U. S. 85 (1961)—retain jurisdiction on the appeal, and return the papers to Judge Murphy with instructions to take the necessary testimony and evidence to determine whether the notes were "statements" within the meaning of the statute. 296 F. 2d 527, 534 (1 Cir. 1961).

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[2] As my Brothers recognize, *supra* pp. 3189-3190, the Supreme Court in *Campbell II* based the clearly-erroneous standard on something more than the trial judge's unique position to evaluate the "demeanor of witnesses." Of course, as was true in *Campbell II*, the clearly-erroneous standard applies even if the district judge is not the same one who conducted the original trial. See 373 U.S. at 493.

[3] This interpretation appears all the more reasonable because the Solicitor General, in opposing defendants' petition for certiorari, conceded that, under *Campbell II*, Judge Murphy's findings that these notes are producible should not be disturbed. Brief in Opposition, p. 36.

The majority here is not content with choosing among these interpretations of the Supreme Court's mandate, but instead takes quite a different tack: "As Judge Murphy's findings of fact were induced by a mistaken view of the law, the limited review of a district judge's findings prescribed by *Campbell II* does not apply, and, in consequence, we were free to determine the facts for ourselves." I take issue with this disposition, not simply because it is wholly foreign to what was envisioned in the Supreme Court's remand mandate, but for more basic reasons.

The premise underlying the majority's position is that Judge Murphy used the wrong standard of law in determining whether the notes are "statements." I cannot agree. True, Judge Murphy asked whether the Shaw notes "set forth in substance what the witness said," but there is not the slightest intimation that this formula was anything less than a paraphrase of the "substantially verbatim recital" phrase of the statute. In fact, Judge Murphy often reverts to the statutory language in his discussion of these particular notes.[4] There is no indication that under his view

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[4] "And since that statute requires production of statements if only '*substantially verbatim*' and recorded but 'contemporaneously,' then so long as such a statement is relevant to the direct testimony of the witness it would be producible under the statute notwithstanding that it were written or recorded by a government attorney, at least if taken during the investigative stage of the case as here, as distinguished from notes made in preparation for trial.

* * * * *

"These October, 1957 notes were therefore producible if they contained 'in substance what the witness said,' there being no question here but that they were in fact contemporaneously written by Shaw. From the beginning to the end of these particular notes they are written in the first person and they contain numerous quotes for responses or questions of third persons with whom Cantellops apparently narrates he was conversing. This, together with the very 'flavor' of the notes, and bearing in mind Shaw's testimony at the post-trial hear-

of the law he would have accepted, as the "statements" required by the Jencks Act, mere "summaries" "which evidence substantial selection of material or which were prepared after the interview without the aid of complete notes." He focused on the contemporaneous aspect of Shaw's transcription and on the resemblance between what Shaw attempted to do and what a stenographer would attempt to do. It would be unfortunate to abstract the formula Judge Murphy employed from his actual use of it and to build a case on the presence of the words "in substance."

Furthermore, even if I were willing to concede, and I am not, that Judge Murphy used the wrong standard of law, it does not at all follow that we, as circuit judges, are "free to determine the facts for ourselves." *Campbell II's* clearly-erroneous standard would of course not apply if the district judge used the wrong standard of law, but the basic value judgment underlying *Campbell II*, namely, that district or trial judges and not circuit judges are the ones best suited to make the findings of fact required in applying the Jencks Act (see 373 U. S. at 493), suggests to me that the proper course for us to take would be to vacate the judgment of the district court, state the correct standard of law that should be used by the district court and remand to the district court to make the appropriate findings of fact. Cf. *Rogers* v. *Richmond*, 365 U. S. 534 (1961); *Townsend* v. *Sain*, 372 U. S. 293 (1963). It seems that this course would be the one to be followed under the majority's premise that Judge Murphy used the wrong standard even if most of the evidence thus far is written and documentary.

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ing, *inter alia*, as to the difficulty of taking a statement from Cantellops, constrains us to conclude (and no *voir dire* seems necessary for us to so find) that these notes would be found by the trial court to be, and are in fact, *substantially verbatim* statements, and of course, relevant to Cantellops' trial testimony on direct examination." 200 F. Supp. at 715-16. (Emphasis added.) See also *Campbell II*, 373 U. S. at 495 n. 10.

especially in light of the fact that on remand to the district court Shaw could be called on to testify. Testimonial evidence may always become relevant and available when the new and proper standard is being applied and I fear that if we decided the facts for ourselves *de novo* we would be depriving the parties of the rich and special experience which a trial judge could always bring to any fact-finding process.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of October one thousand nine hundred and sixty-four.

Present: HON. STERRY R. WATERMAN, HON. LEONARD P. MOORE, HON. THURGOOD MARSHALL, *Circuit Judges.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ALFREDO AVILES, ET AL., *Defendants,*
CHARLES BARCELLONA, ET AL., *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

Text of the Jencks Act, 18 U.S.C. § 3500:

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement

shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.